UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ROBERT NOVAK D/B/A PETS WAREHOUSE AND PETSWAREHOUSE.COM,

Plaintiff,

- against -

MEMORANDUM & ORDER
02-CV-5164 (DRH) (JO)

OVERTURE SERVICES, INC., GOOGLE, INC., INNOVATIVE MARKETING SOLUTIONS, INC. d/b/a KANOODLE.COM, JOHN HOLDEFEHR d/b/a JUDGE-FOR-YOURSELF.COM, BIOCHEMICS, INC. d/b/a DOCTORDOG.COM,

Defendants.
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A P P E A R A N C E S :

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HURLEY, District Judge:

INTRODUCTION

The above-captioned Plaintiff submitted a "Notice of Voluntary Dismissal" of all claims against all remaining Defendants on December 22, 2004. The notice was "so ordered," but due to a clerical error, it was not docketed and the case was not closed at that time. (The case was subsequently administratively closed on January 20, 2005.) The parties have since disputed whether Plaintiff's voluntary dismissal should be with or without prejudice, as the notice did not specify. On January 20, 2005 this Court directed the parties to submit additional letters addressing this issue. Having reviewed the parties' timely responses, relevant legal authority, and the history of this case itself, the Court will now deem Plaintiff's dismissal to have been *without prejudice.*

DISCUSSION

Under Federal Rule of Civil Procedure 41, voluntary dismissals are made without prejudice unless otherwise stated. F.R.C.P. 41(a)(2). Similarly, where a court's order fails to specify whether dismissal is with or without prejudice, the dismissal is without prejudice. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2367 (2d ed. 1995). It is true, as the Defendants suggest, that voluntary dismissal without prejudice is not a matter of right; rather, the Second Circuit has indicated that a court should use its discretion in considering whether to dismiss without prejudice, based on the following relevant factors: "the plaintiff's diligence in bringing the motion; any 'undue vexatiousness' on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss." *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). Nevertheless, "the presumption in this circuit is that a court should grant a dismissal [without prejudice] pursuant to 41(a)(2) absent a showing that the defendants will suffer *substantial* prejudice as a result." *Guzman v. Hazemag U.S.A., Inc.*, 145 F.R.D. 308, 309 (E.D.N.Y. 1993) (emphasis added) (internal citations omitted).

A key factor in finding sufficiently substantial prejudice to a defendant is the stage of litigation in which the plaintiff requests voluntary dismissal; where a trial is imminent or ongoing, the courts of this Circuit have tended to dismiss with prejudice. *See Zagano*, 900 F.2d at 14 (denying motion for voluntary dismissal without prejudice made "when the trial was less than ten days away"); *Bosteve Ltd. v. Marauszwki*, 110 F.R.D. 257, 259 (E.D.N.Y. 1986) (denying motion for voluntary dismissal without prejudice where brought "on the eve of trial"); *and Wakefield v. N. Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985) (affirming refusal to allow voluntary dismissal of claim without prejudice where request made after trial but before submission to jury). By contrast, where litigation has been pending for some time, but trial is not imminent, dismissal without prejudice has not been considered unduly burdensome on the defendant. *See Guzman v. Hazemag U.S.A., Inc.*, 145 F.R.D. 308, 310 (E.D.N.Y. 1993). In the present case, although there have been some pretrial discovery disputes, the case has not been extensively litigated, and trial is not imminent.

Finally, an examination of the docket reveals that Plaintiff previously voluntarily dismissed all of his claims against several co-defendants originally named in the complaint. In each instance, Plaintiff's notice of voluntary dismissal *clearly specified* that the dismissal was to be *with prejudice*. The silence of the presently-disputed notice of dismissal as to prejudice should thus have alerted the remaining Defendants to the likelihood that Plaintiff intended to dismiss this action *without* prejudice.

CONCLUSION

For all of the above reasons, all of the Plaintiff's remaining claims against all of the remaining Defendants, as well as any remaining counter-claims, are hereby DISMISSED WITHOUT PREJUDICE.

SO ORDERED.

Dated: Central Islip, New York
February 16, 2005

Denis R. Hurley
United States District Judge